

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of

Implementation of the Local
Competition Provisions in the
Telecommunications Act of 1996

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) CC Docket No. 96-98
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To: The Commission

OPPOSITION ON BEHALF OF AMERICAN ELECTRIC POWER
SERVICE CORPORATION, COMMONWEALTH EDISON
COMPANY, DUKE POWER COMPANY, ENTERGY
SERVICES, INC., NORTHERN STATES POWER
COMPANY AND THE SOUTHERN COMPANY

TO

PETITION FOR RECONSIDERATION OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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EXECUTIVE SUMMARY

The Infrastructure Owners oppose that portion of the Petition for Reconsideration of the National Cable Television Association, Inc. ("NCTA") requesting that the Commission require the States to certify that they regulate access to poles, ducts, conduits, and rights-of-way as a precondition of preempting the Commission jurisdiction over such matters under the Pole Attachments Act. NCTA's is straightforward, but wrong: the Commission has no statutory authority to require the States to certify as to access matters.

The language of the Pole Attachments Act is clear, unambiguous and explicit. Clearly, the States must certify that they regulate the rates, terms and conditions of poles, ducts, conduits and rights-of-way in order to preempt the FCC's jurisdiction over those matters. Equally as clear, however, is the absence of any similar requirement with respect to regulation of access matters. Accordingly, the Commission properly held that State certification of access matters is not required. That decision should not be reconsidered.

NCTA also suggests that the States should be required to follow the federal lead with respect to access to poles, ducts, conduits and rights-of-way. Nothing in the statute or its legislative history supports this suggestion. Indeed, to the contrary, once a State preempts the federal jurisdiction, it is not bound by the federal law. As the FCC correctly found, Congress did not intend to establish a national policy on access

matters, as plainly evidenced by the statutory language it choose. Thus, NCTA's suggestion in favor of a nationwide policy must be ignored.

WASHINGTON, D.C. 20554

American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company and The Southern Company, and (collectively referred to as the "Infrastructure Owners"), through their undersigned counsel and pursuant to Section 1.429(f) of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission") submit this Opposition, in part, to the Petition for Reconsideration of the

First Report and Order, CC Docket No. 96-98, released August 8, 1996 (hereinafter "First Report and Order")^{1/} filed by the National Cable Television Association, Inc. ("NCTA"). Specifically, the Infrastructure Owners oppose NCTA's assertion that the Commission should require separate certification as a precondition to State regulation over access to poles.

INTRODUCTION

1. The Infrastructure Owners are investor-owned electric or power utilities (or parents, subsidiaries or affiliates of electric or power utilities) engaged in the generation, transmission, distribution, and sale of electric energy.^{2/} The Infrastructure Owners own electric energy distribution systems that include millions of distribution poles and thousands of miles of conduits, ducts and rights-of-way, all of which are used to provide electric power service to millions of residential and business customers. To the extent those facilities are used for communications and the State in question has not preempted the FCC's jurisdiction, the Infrastructure Owners are subject to regulation by the Commission under the federal Pole Attachments

^{1/} First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (released Aug. 8, 1996), 61 Fed. Reg. 45,476 (Aug. 29, 1996).

^{2/} A general description of each of the Infrastructure Owners is attached hereto as Appendix I.

Act, 47 U.S.C. § 224, as amended.^{3/} The Infrastructure Owners have a vital interest in, and are directly affected by, those portions of the Commission's First Report and Order addressing Section 224(f), access and denial of access to poles, ducts, conduits and rights-of-way, and Section 224(h), written notification of intended modifications to poles, ducts, conduits and rights-of-way.^{4/}

2. In its Petition for Reconsideration, NCTA asserts that the FCC should require separate certification as a precondition to state regulation over access to poles.^{5/} NCTA contends that the FCC's failure to require such a certification contravenes the language and intent of the amendments to Section 224, will prolong and complicate pole attachment disputes and could undermine the choice granted to potential attaching parties to vindicate their rights either as part of an overall Section 252 arbitration or via an independent complaint brought under section 224.^{6/} Finally, NCTA asserts that certification is

^{3/} Some of the Infrastructure Owners provide energy service in states that have preempted the Commission's jurisdiction under Section 224 by making the certification required by 47 U.S.C. § 224(c)(2), and are therefore subject to state regulation of pole attachments. Nonetheless, because the federal statute serves as the loose "benchmark" on pole attachment and related issues, all of the Infrastructure Owners have a significant interest in the Commission's actions concerning such issues.

^{4/} The FCC's discussion of these issues is found at ¶s 1119-1240 of the First Report and Order.

^{5/} NCTA Petition for Reconsideration (hereinafter referred to as "NCTA Petition") at 20-23.

^{6/} NCTA Petition at 20-22.

required because without certification, the FCC has no means of assuring that state access rules are in conformity with the strong presumption in favor access mandated by federal law.^{2/}

3. As fully discussed below, NCTA's assertion that the Commission erred in failing to require States to certify that they regulate access to poles, ducts, conduits and rights-of-way as a condition to preempting the FCC's jurisdiction over such poles, ducts, conduits and rights-of-way is wrong. As a matter of law, the Commission has no statutory authority to require the States to certify as to access matters. Similarly, once a State has preempted the FCC's jurisdiction over access matters, the Commission has no statutory authority to prescribe the manner in which the State must regulate such matters. Finally, NCTA's assertion that pole attachment disputes will be prolonged and complicated and that the choice of whether to pursue a challenge to access rights in the context of an overall Section 252 arbitration or via an independent complaint brought under section 224 will be undermined without a State's certification is mere speculation and, as a matter of fact, unsupportable.

ARGUMENT

I. The Commission Has No Statutory Authority to Require the States to Certify that They Regulate Access Matters

4. An agency construing a statute must be mindful of the two-step inquiry set forth by the Supreme Court regarding

^{2/} Id. at 22-23.

questions of statutory interpretation.^{8/} That inquiry is as follows:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.^{9/}

In determining whether Congress had an intention on the precise question at issue, Chevron indicates that "traditional tools of statutory construction," must be employed.^{10/} "[T]he first step in any statutory analysis, and [the] primary interpretive tool, is the language of the statute itself."^{11/} Moreover, where "Congress knows how to say something but chooses not to, its silence is controlling."^{12/} "[I]t is generally presumed that Congress acts intentionally and purposely when it includes

^{8/} Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

^{9/} Chevron, 467 U.S. at 842-43.

^{10/} ACLU v. Federal Communications Comm'n, 823 F.2d 1554, 1568 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988) (citing Chevron, 467 U.S. at 843 n.9).

^{11/} ACLU, 823 F.2d at 1568 (citing Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985) ("it is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'" (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975))).

^{12/} BFP v. Resolution Trust Corp., 511 U.S. 531, ___, 114 S. Ct. 1757, 1761 (1994).

particular language in one section of a statute but omits it in another . . ."^{13/} With respect to the question of whether the States must certify to the FCC that they regulate matters of access to poles, ducts, conduits and rights-of-way as a condition to preempting the FCC's jurisdiction in this area, the intent of Congress is clear: the statute does not provide for, nor does the Commission have authority to require, State certification of access matters.

5. Section 224 establishes the States' ability to preempt the FCC's jurisdiction over "pole attachments"^{14/}:

(c)(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection(f), for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that --

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the

^{13/} Id. (quoting Chicago v. Environmental Defense Fund, 511 U.S. 328, ___, 114 S. Ct. 1588, 1593 (1994)); see also Rodriguez v. United States, 480 U.S. 522, 525 (1987) ("[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."); Russello v. United States, 464 U.S. 16, 23 (1983).

^{14/} The term "pole attachment" is defined as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4).

authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.^{15/}

As a further condition of preempting the FCC's jurisdiction, States must issue and make effective rules and regulations implementing their regulatory authority over pole attachments and take final action on an individual complaint within 180 days after the complaint is filed with the State or within the applicable period prescribed in the State's rules and regulations, if the prescribed period does not extend beyond 360 days after the filing of the complaint.^{16/}

6. Based on the plain language of the provisions at issue -- the starting point on questions of statutory construction -- it is clear that Congress has spoken on the precise question of whether the States must certify to the FCC that they regulate the question of access. States need not certify on access matters; to the contrary, such a requirement is blatantly omitted, in contrast to the express requirement that States certify that they regulate the rates, terms and conditions of pole attachments.^{17/}

7. The Commission properly interpreted the statute, finding that the amendments to the reverse preemption scheme

^{15/} 47 U.S.C. § 224(c).

^{16/} 47 U.S.C. § 224(c)(3).

^{17/} 47 U.S.C. § 224(c)(2).

enacted as part of the Telecommunications Act of 1996^{18/} do not require the States to certify as to matters of access. In making this determination, the Commission correctly "note[d] that Congress did not amend sections 224(c)(2) to prescribe a certification procedure with respect to access (as distinct from the rates, terms and conditions of access)."^{19/} The Commission's determination is consistent with the plain language of the statute, as well as the overall statutory scheme. The omission of an express requirement that States certify that they regulate access matters must be presumed intentional, especially where Congress was aware of the certification requirement with respect to rates, terms and conditions of pole attachments that was enacted as part of the 1978 Pole Attachments Act some 18 years ago. Congress amended the certification provisions as part of the 1996 Act to require the States "to consider the interests of the subscribers of the services offered via such attachments," whereas the previous law required States to certify that they consider the interests of cable television systems and consumers of the utility services. Congress did not, however, enact a requirement that States certify as to access issues. Based on the plain language of the statute and the overall statutory scheme, the Commission properly found that certification is not required before the States can preempt its jurisdiction over

^{18/} Pub. L. No. 104-104, 110 Stat. 56 (1996) ("the 1996 Act").

^{19/} First Report and Order at ¶ 1240.

access matters. For this reason alone, NCTA's petition for reconsideration should be denied.

II. The Commission Has No Statutory Authority to Prescribe the Manner in Which the States Must Regulate Access Matters

8. NCTA also argues that the Commission should require States to certify as to access matters because without such certification, the FCC will have no means of assuring that "those rules [are] in conformity with the strong presumption in favor of access mandated by Federal law."^{20/} This argument is without merit.

9. The plain language of Section 224(c)(1) is unambiguous. The FCC has no jurisdiction "with respect to rates, terms, and conditions, or access to poles, ducts, conduits and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by a State."^{21/} Thus, once a State has preempted the FCC's jurisdiction, the FCC has no further statutory authority to review the State's access rules or regulations to ensure conformity with the federal rules and regulations.

10. The FCC correctly interpreted the statute in this respect. It held that the States' have the ability to preempt the FCC's jurisdiction on questions of access and rejected the contention that Congress intended to establish a federal policy

^{20/} NCTA Petition at 22-23.

^{21/} 47 U.S.C. § 224(c)(1).

on access questions.^{22/} The Commission correctly found that "Congress' clear grant of authority to the States to preempt federal regulation in these cases [access cases] undercuts the suggestion that Congress sought to establish federal access regulations of universal applicability."^{23/} Had Congress intended to establish a federal access policy, it would not have amended Section 224(c)(1) to specifically delegate authority to the States to regulate access matters. Congress must be presumed to act intentionally and with purpose.^{24/} Congress' intention is controlling.^{25/} The FCC properly followed the Congressional intent in finding that it has no authority to establish a nationwide policy on access decisions, or to require States that have preempted its jurisdiction on access matters to conform their rules and regulations to the federal law. Thus, NCTA's petition for reconsideration must be denied.

^{22/} First Report and Order, ¶ 1238.

^{23/} First Report and Order, ¶ 1238.

^{24/} Id. (quoting Chicago v. Environmental Defense Fund, 511 U.S. ___, ___, 114 S. Ct. 1588, 1593 (1994); see also Rodriguez v. United States, 480 U.S. 522, 525 (1987) ("[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."); Russello v. United States, 464 U.S. 16, 23 (1983)).

^{25/} Chevron, 467 U.S. at 842-43.

III. NCTA's Assertion that Pole Attachment Disputes Will Be Prolonged and Complicated Unless the States Are Required to Certify that They Regulate Access Matters Is Factually Incorrect

11. As its final argument in favor of the position that the FCC should require States to certify as to their authority over access matters, NCTA asserts that without the States' certification pole attachments disputes will be "inevitably" prolonged and complicated because parties to those disputes will not know the proper forum -- state or federal -- in which to file a complaint.^{26/} According to NCTA, "[i]n the absence of certification, a complaining party can only guess whether or not a State actually regulates access before deciding whether to file the complaint at the FCC or with the State commission."^{27/} This argument is specious.

12. As a factual matter, NCTA's position is predicated on a presumption that a complaining party will undertake no due diligence as to where jurisdiction over the access complaint lies. A complaining party can be expected to investigate jurisdictional issues in the course of investigating the underlying legal issues. Such an investigation is routine when filing a complaint -- whether it be in court or before an administrative agency, whether the complaint is brought pursuant to federal or state law.

^{26/} NCTA Petition at 21.

^{27/} NCTA Petition at 21.

13. Moreover, the FCC has provided guidance in its First Report and Order as to how a State may demonstrate its that it regulates access issues.^{28/} There, the FCC states that because the States are not required by the 1996 Act to "recertify" that they regulate access, a defendant to an access complaint may come forward to establish that the State does, in fact, regulate access matters by citing to state laws and regulations governing access and establishing a procedure for resolving access complaints in a state forum. The Commission noted that evidence that access complaints are resolved within a specific period of time would be considered especially probative.^{29/} If the Commission determines that the State regulates access, it will dismiss the complaint before it, without prejudice to the filing of the complaint in the appropriate state forum.^{30/} In short, the Infrastructure Owners submit that the factual presumption necessary to sustain NCTA's argument is tenuous, and a gross exaggeration of likely scenarios a party to an access dispute will confront, at best. Accordingly, for this and all of the above reasons, NCTA's Petition for Reconsideration should be denied as to its request that States be required to certify that they regulate access matters.

^{28/} First Report and Order, ¶ 1240.

^{29/} Id.

^{30/} Id.

CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company, and The Southern Company urge the Commission to deny the Petition for Reconsideration of the National Cable Television Association, Inc. and to proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company and The Southern Company

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Dated: October 31, 1996

APPENDIX I

INFRASTRUCTURE OWNER COMPANY DESCRIPTIONS

American Electric Power Service Corporation, a wholly-owned subsidiary of American Electric Power Co., Inc., is an organization which provides administrative, engineering, financial, legal and other services to the operating companies of American Electric Power Co., Inc. American Electric Power Co., Inc. is a public utility holding company registered under the Public Utility Holding Company Act of 1935, and holds all of the issued and outstanding common stock of the following companies: Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Columbus Southern Power Company, Kingsport Power Company, and Wheeling Power Company.

Commonwealth Edison Company ("ComEd") is an investor-owned public utility that supplies electricity to approximately 3.3 million retail customers in a service territory that includes roughly the northern one-third of Illinois and includes the city of Chicago and its suburbs. ComEd and its parent holding company, Unicom Corporation, are corporations organized and existing under the laws of the State of Illinois. ComEd is subject to the jurisdiction of the Illinois Commerce Commission as a public utility. ComEd also provides wholesale requirements service to several municipalities located in its service area. With respect to that service, as well as to coordination

agreements ComEd has with numerous other electric suppliers for the interstate transmission of energy, ComEd is subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC").

Duke Power Company ("DPC") supplies electricity to more than 1.7 million residential, commercial, and industrial customers in a 20,000 square-mile service area in North Carolina and South Carolina. DPC owns solely, or jointly, 1,772,732 electric distribution poles.

Entergy Services, Inc. is a subsidiary of Entergy Corporation, a public utility holding company organized pursuant to the provisions of the Public Utility Holding Company Act of 1935. Entergy Corporation owns all of the outstanding shares of common stock of the following five operating company subsidiaries: Entergy Arkansas, Inc. (formerly Arkansas Power & Light Company), Entergy Gulf States, Inc. (formerly Gulf States Utilities Company), Entergy Louisiana, Inc. (formerly Louisiana Power & Light Company), Entergy Mississippi, Inc. (formerly Mississippi Power & Light Company), and Entergy New Orleans, Inc. (formerly New Orleans Public Service, Inc.) (collectively, the "Entergy Operating Companies"). The Entergy Operating Companies engage in the manufacture, generation, transmission, distribution, and sale of electricity to more than 2.3 million retail customers throughout 112,000 square miles of Arkansas, Louisiana, Texas, and Mississippi. Entergy Services, Inc. provides engineering, transmission, distribution planning,

financial, human resource, tax, accounting, legal, and other services to the Entergy Operating Companies.

Northern States Power Company ("NSP"), headquartered in Minneapolis, Minnesota, is a major utility company with growing domestic and overseas non-regulated energy ventures. NSP and its wholly-owned subsidiary, Northern States Power Company-Wisconsin, operate generation, transmission, and distribution facilities providing electricity to about 1.4 million customers in Minnesota, Wisconsin, North Dakota, South Dakota, and Michigan. The two companies also distribute natural gas to more than 400,000 customers in Minnesota, North Dakota, and Michigan, and provide a variety of energy-related services throughout their service areas.

The Southern Company is the parent firm of five electric utilities: Alabama Power, Georgia Power, Gulf Power, Mississippi Power, and Savannah Electric. Other subsidiaries include Southern Electric International, Southern Nuclear, Southern Development and Investment Group, Southern Communications Services, Inc., and Southern Company Services.

The Southern Company supplies energy to a 120,000-square mile U.S. service territory spanning most of Georgia and Alabama, southeastern Mississippi, and the panhandle region of Florida -- an area with a population of about 11 million. Through its Southern Electric International unit, The Southern Company also supplies electricity to customers in a number of other states and in Argentina, England, Chile, the Bahamas, Trinidad, and Tobago.

CERTIFICATE OF SERVICE

I hereby Certify that on this 31st day of October 1996, I caused true and correct copies of the Opposition of American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Northern States Power Company, and The Southern Company to National Cable Television Association's Petition for Reconsideration to be served via Hand-Delivery on:

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